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action of ejectment is a sufficient act of disaffirmance in the case of a recovery for condition broken,¹⁷ while in the case of infancy all that is necessary to give the grantor the right to possession is some overt act of disaffirmance such as a subsequent deed to a third person, or an action to set aside the deed or to recover possession of the premises.¹⁸ Since, therefore, there has been this modification in the case of other conveyances which at law are held to be voidable, there seems to be no reason for not applying the same rule to lunatics' voidable conveyances and allowing an action of ejectment; the bringing of the action to serve the double purpose of revesting title and recovering possession.¹⁹

VESTING OF UNREGULATED DISCRETION IN OFFICERS BY ORDINANCE.—The first prerequisite to the validity of any ordinance is that the municipality confine itself to the powers set forth in its charter of incorporation. This question comes up in cases where the municipality, under its general powers to declare and regulate nuisances, forbids the doing of certain acts without the consent of an officer, for if it has no power over the particular subject matter, the vesting of an uncontrolled discretion in an administrative agent to act in respect to it is of itself regulation and clearly invalid. The power of the municipality is restricted to declaring that a nuisance which is a nuisance *per se*, or which, under the circumstances, is in fact so, and the court has the final voice as to what constitutes a nuisance.¹ In the recent case of *Ex parte Broussard* (Tex. 1914) 169 S. W. 660, an ordinance making it unlawful to maintain stock pens including more than six heads of cattle within 300 feet of any residence or hotel without a permit from the city council, was held, one judge dissenting, to be within the powers of the municipality and valid. It is obvious that stock pens when maintained in cities or populated sections may become nuisances and so subject to regulation as such.²

But the objection was urged that the ordinance was void because it vested an uncontrolled and arbitrary discretion in the administrative agents. Similar ordinances have been declared void on the ground that they are unreasonable,³ and this without any apparent recourse to constitutional objections. The reasoning of the courts in many instances proceeds upon the theory that an ordinance which places within the arbitrary discretion of an individual, or set of individuals, the power to prohibit acts not of such a nature as to justify prohibition, is an unreasonable exercise of the municipal function.⁴ But where

¹Tiffany, Real Property, § 74; cf. note on "Enforcement of Forfeiture Conditions in Leases for Years", at p. 58, *supra*.

²Reeves, Real Property, 1444.

³See 2 Reeves, Real Property, 1445.

⁴McQuillin, Municipal Ordinances, §§ 441, 442; see *Laugel v. City of Bushnell* (1902) 197 Ill. 20.

⁵Joyce, Law of Nuisances, §§ 208, 209. In *Hagerstown v. Baltimore & O. R. R.* (1908) 107 Md. 178, a case somewhat similar to the main case, the court intimated that stockyards were not nuisances *per se*. The fact that the ordinance worked oppressively in this particular instance, seems to have been largely responsible for the dictum.

⁶See 2 Dillon, Municipal Corporations (5th ed.) § 598.

⁷Matter of Frazee (1886) 63 Mich. 396; *City of Chicago v. Trotter* (1891) 136 Ill. 430.

the ordinances have been sustained, the courts seem to follow the rule that if the act is one which may be regulated, there is no objection to the exercise of such a power in the form of a prohibition unless a permit is secured.⁵ It is evident that the latter rule is open to the objection that the power to regulate does not include the power to prohibit arbitrarily.

It would seem that the question of reasonableness or unreasonableness is to be determined in the light of constitutional limitations, and that declaring an ordinance unreasonable is but another way of saying that the ordinance is repugnant either to the State or federal constitution. The test of constitutionality which the State courts seem to apply, is that if the ordinance deals with a fundamental right it is void, since the exercise of inherent and fundamental rights cannot be made to depend upon the uncontrolled discretion of a non-judicial body,⁶ inasmuch as this places the individual without the domain of the law and so denies him due process. If, on the other hand, it deals with a thing which may be prohibited altogether, something which the individual had no right to do, then he has little cause to complain of the fact that there is an arbitrary discretion in an administrative body to grant or withhold the privilege,⁷ especially since it is always presumed that the officer will not act arbitrarily, and if he does so act, the aggrieved party is, as a rule, afforded relief.⁸ An ordinance is unconstitutional, therefore, which makes it unlawful for persons without first procuring a permit, to parade,⁹ or to engage in the dairy business,¹⁰ or to establish a private meat market,¹¹ or to engage in a business dealing with explosive oils,¹² since, in the opinion of the court, it deals with the exercise of a fundamental right. But, on the contrary, an ordinance is valid which vests a discretion in administrative agents to license a nuisance, or something which the individual has no inherent right to

⁵See 2 Dillon, *Municipal Corporations* (5th ed.) § 598; cf. Elliott, *Municipal Corporations* (2nd ed.) § 156.

⁶*City of Richmond v. Dudley* (1891) 129 Ind. 112; *State v. Mahner* (1891) 43 La. Ann. 496.

⁷*Quincy v. Kennard* (1890) 151 Mass. 563; *In re Flaherty* (1895) 105 Cal. 558; *Love v. Judge of Recorder's Court* (1901) 128 Mich. 545.

⁸It is not clear in just what cases mandamus will issue to compel an officer to perform a duty involving the exercise of discretion. See *People v. Grant* (1891) 126 N. Y. 473, where it was refused. When, however, the administrative agent, arbitrarily and plainly without any reason, refuses to grant a license, mandamus should lie. *Sansom v. Mercer* (1887) 68 Tex. 488; *C. B. George & Bro. v. City of Winchester* (1904) 118 Ky. 429.

⁹*Cf. Anderson v. City of Wellington* (1888) 40 Kan. 173; *City of Chicago v. Trotter, supra*; *Matter of Frazee, supra*.

¹⁰*Cf. State v. Mahner, supra*; but see *People v. Vandecarr* (1903) 175 N. Y. 440, in which a similar ordinance was held constitutional. The latter decision illustrates the tendency of the State to give wide scope to the operation of administrative law. This tendency is sanctioned by the Supreme Court, which, in *Fischer v. St. Louis* (1904) 194 U. S. 351, refused to declare unconstitutional an ordinance like the one in the New York case.

¹¹*State v. Dubarry* (1892) 44 La. Ann. 1117.

¹²*City of Richmond v. Dudley, supra*.

do, like one forbidding the beating of drums in the street,¹³ or the making of public addresses in public places.¹⁴

In the Supreme Court, however, the question takes on a different aspect. Every presumption is in favor of the constitutionality of the ordinance; the determination by the State court that the ordinance deals with a nuisance or a non-fundamental right carries great weight, and the Supreme Court will be inclined to uphold it.¹⁵ The Court, moreover, has gone even further, and has held that the vesting of complete discretion in reference to a proper subject of the police power is not of itself repugnant to the Fourteenth Amendment.¹⁶ The decision, indeed, seems broad enough to include ordinances dealing with fundamental rights, although it is open to question as to whether it is an authority for anything more than an attempt to confine the application of *Yick Wo v. Hopkins*¹⁷ to its precise circumstances. From the decisions so far, therefore, it may be said that wherever the subject regulated cannot be claimed as an inherent right, and may be altogether prohibited,¹⁸ or where it is a proper subject of regulation under the police power of the State,¹⁹ and there is no showing of any general practice of making arbitrary discriminations, the provisions of the Fourteenth Amendment are satisfied.²⁰

It is to be noted, however, that the fact that a thing may be prohibited to all does not mean that it can be arbitrarily prohibited to some and not to others. In providing for the "equal protection of the laws", the Fourteenth Amendment guarantees against inequality of privileges; it guards against arbitrary dispensation of privileges, as well as infringements of rights by the State.²¹ The vesting of uncontrolled discretion, whether in reference to fundamental rights or not, results in a grave possibility of special privileges. It would seem, therefore, that in all such cases the Fourteenth Amendment is not to be lightly reckoned with, and that unless comparatively small interests are involved and a strong governmental necessity exists for administrative regulation, the constitutionality of an ordinance vesting unregulated discretion can be seriously questioned.²²

¹³*In re Flaherty*, *supra*.

¹⁴*Love v. Judge of Recorder's Court*, *supra*.

¹⁵*Davis v. Massachusetts* (1897) 167 U. S. 43; *Wilson v. Eureka City* (1899) 173 U. S. 32.

¹⁶*Lieberman v. Van De Carr* (1905) 199 U. S. 552, at p. 562, the Court says: "the conferring of discretionary power upon administrative boards to grant or withhold permission to carry on a trade or business which is a proper subject of regulation within the police power of the State is not violative of rights secured by the Fourteenth Amendment."

¹⁷(1886) 118 U. S. 356. In this case, the ordinance vested unregulated discretion in reference to a legitimate business, and flagrant discriminations had actually been practiced.

¹⁸See note 17; *Crowley v. Christensen* (1890) 137 U. S. 86, 94.

¹⁹*Liebermann v. Van De Carr*, *supra*; *Fischer v. St. Louis*, *supra*.

²⁰The recent case of *Cutsinger v. City of Atlanta* (Ga. 1914) 83 S. E. 263, represents the inclination of the State court to make a broad application of these principles enunciated by the Supreme Court.

²¹*Freund, Police Power*, §§ 639, 640; *Cooley, Constitutional Limitations* (7th ed.) 561, 562.

²²*Freund, Police Power*, §§ 643, 644; 2 *Willoughby on the Constitution*, 1296.